JUN 6 1945
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1944.

CHARLES A. HOTTENSTEIN, CARL SCHMOYER and ANDREW FEKETY,
Petitioners,

v.

YORK ICE MACHINERY CORPORATION,
Respondent.

No. 1282.

PETITION FOR A WRIT OF CERTIORARI TO CORRECT A DIMINUTION OF RECORD.

GEORGE S. MUNSON,
PHILADELPHIA, PA.

ROBERT H. RICHARDS,
AARON FINGER,
WILMINGTON, DELAWARE.
Counsel for Respondent.

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA.

Supreme Court of the United States

OCTOBER TERM, 1944.

Charles A. Hottenstein, Carl Schmoyer and Andrew Fekety, Petitioners,

v.

York Ice Machinery Corporation, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO CORRECT A DIMINUTION OF RECORD.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE ABOVE COURT:

York Corporation (formerly York Ice Machinery Corporation), the respondent above named, suggests to this Court that, in connection with the petition for writ of certiorari filed herein, the transcript of record, duly certified and filed herein on the 16th day of May, 1945, is incomplete and that there is a diminution of said record, in that the following described papers, viz.:

Docket Entries in Circuit Court of Appeals for the Third Circuit

Reply to Affidavit of George D. Hornstein

are a part of the record in said cause and are essential to a complete understanding of the questions raised in this Court, but are not included in and made a part of the original transcript of record duly certified and filed herein on the date aforesaid; but that a supplement to said

record, consisting of the above described papers, was duly certified by the Clerk of said Circuit Court of Appeals and forwarded by him on or about May 31, 1945, to the Clerk of the Supreme Court of the United States.

It appears from said supplemental transcript of record that on December 8, 1944, the date when oral argument was heard before the Judges of the Circuit Court of Appeals (R. 68), Seymour M. Heilbron, of counsel for Petitioners, filed a lengthy affidavit setting forth certain allegations and evidence presented in both the injunction suit and appraisal proceedings. Seven days after the argument before the Circuit Court of Appeals, to wit, on December 15, 1944, George D. Hornstein, also of counsel for Petitioners, filed his affidavit in the proceedings, which also contained certain allegations and evidence presented in both the injunction suit and the appraisal proceeding. Those affidavits of counsel are included in the docket entries and in the original transcript of record. Thereafter, on December 19, 1944, counsel for Respondent filed a reply to the Hornstein affidavit, which reply was noted on the docket and contained important statements of fact and extracts from the record in the previous proceedings which refuted allegations contained in the Hornstein affidavit. The filing of the Hornstein affidavit and the said reply thereto were noted in the docket entries in the Circuit Court of Appeals for the Third Circuit as follows:

> "Dec. 15, 1944 Affidavit of George D. Hornstein filed.
>
> Dec. 19, 1944 Reply of Defendant to Affidavit of George D. Hornstein filed".

Said supplement to the record is essential to a proper understanding of both the basis of the charges made by counsel for the Petitioners and the defenses interposed on behalf of the Respondent, and the exclusion thereof from the record will be prejudicial to Respondent and prevent an adequate examination of the facts. Thereafter briefs

and memoranda of counsel were filed, both on behalf of the Petitioners and Respondents, in support of and in opposition to a motion for reargument, but such briefs and memoranda are not included as a part of either the original transcript of record filed or the supplement to the record covered by this petition.

Respondent has requested counsel for Petitioners to stipulate for the inclusion of said supplement in the record of this cause, but Petitioners' counsel have refused to do so. The only reason given for such refusal was that the reply to the Hornstein affidavit was in the nature of a brief and was not sworn to. Said reply was a written document, signed by counsel for Respondent, and was submitted under the sanctity of the general oath of the attorneys at law who signed it. It could have had no greater or higher sanctity if it had been specifically sworn to, as was Mr. Hornstein's affidavit.

WHEREFORE Respondent moves that this Court direct that the certified supplement forwarded to the Clerk of this Court on or about May 31, 1945, by the Clerk of the Circuit Court of Appeals for the Third Circuit, as a supplement to said transcript of record filed herein on May 16, 1945, be included in and made a part of the transcript of record in this cause. A copy of said supplement to the record is appended to this motion.

GEORGE S. MUNSON,
ROBERT H. RICHARDS,
AARON FINGER,
Counsel for Respondent.

COMMONWEALTH OF PENNSYLVANIA }
CITY AND COUNTY OF PHILADELPHIA }

I, GEORGE S. MUNSON, counsel for the Respondent in the above entitled cause, do solemnly swear that the facts recited in the foregoing petition for writ of certiorari are true.

GEORGE S. MUNSON,
Counsel for Respondent.

Sworn to and subscribed before me, this 5th day of June, 1945.

(SEAL)

MARGARET C. MALCOMSON,
Notary Public.

My Commission Expires February 23, 1949